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OLC 78-2200/1

22 AUG 1978

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CAO

MEMORANDUM FOR: Director of Central Intelligence

THROUGH: Deputy Director of Central Intelligence

25X1 FROM:

[Redacted]
Acting Legislative Counsel

SUBJECT: Luncheon Meeting with Comptroller General
Elmer Staats on Tuesday, 22 August 1978

X1 1. [Redacted] Action Requested: This memorandum provides background for your luncheon meeting today with Comptroller General Elmer Staats on the matter of legislation sponsored by Chairman Jack Brooks (D., Tex.), House Government Operations Committee, that would, among other things, open the Director's confidential funds authority to Comptroller General review. The memorandum also discusses issues that should be raised with Mr. Staats.

X1 2. [Redacted] Background: Last April Congressman Brooks introduced H.R. 12171, the "Federal Accounting and Auditing Act of 1978." Basically this legislation would make any confidential funds authority enjoyed by the President or other Executive Branch official subject to full review by the Comptroller General; the bill also provides an independent right of access to the courts by the Comptroller General to enforce this authority.

We have raised serious concern with this legislation by letters to Chairmen Brooks and Boland (attached at Tab A). The Department of Justice offered testimony in opposition to the bill. Chairman Brooks' Committee, however, completed action on the bill and is now ready to file its report without changing the bill. It is entirely possible that Chairman Brooks may have introduced his bill at least in part at Mr. Staats' urging.

At our behest, the House Permanent Select Committee on Intelligence (HPSCI) has requested the Speaker to refer the bill to the HPSCI; the referral will not take place until Chairman Brooks' Committee files its report. Within the last few days, however, Chairman Boland apparently has come under pressure from Chairman Brooks not to delay floor action on H.R. 12171; Chairman Brooks apparently is holding off filing his report until Chairman Boland lets him know whether an amendment acceptable to the Community can be worked out. Members of OLC and the Office of the Comptroller talked with Mike O'Neil, HPSCI Chief Counsel, yesterday; representatives of the FBI were also present. Mike O'Neil said the HPSCI is under the gun to provide Chairman Brooks by the middle of this week with such amendatory language.

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The clear intent of the bill is to open for GAO audit the financial funds authority now enjoyed by Community entities. However, we do not know specifically what has precipitated Chairman Brooks' pressure to have the bill enacted this session. (Although a companion bill has not yet been introduced in the Senate, we have received indications that such a move is likely.) It is possible Chairman Brooks is interested in seizing the initiative and enacting a "confidential funds overriding authority" in advance of the charter legislation, which has its own such provision (section 123).

Although Comptroller General Staats has indicated in a recent exchange of views that he is not interested in conducting audits of the CIA (see Tab B), he did testify in favor of H.R. 12171; Mr. Staats may have had in mind all along that this bill is necessary to give him the authority he would need to audit Agency funds. It would be useful if we could obtain a clarification of Mr. Staats' current views on this matter.

The intelligence charter legislation contains in section 123 authorities and limitations on Comptroller General audit of intelligence activities and expenditures of funds by Community entities. This matter is currently being studied by the charter legislation working group, but there is not yet a coordinated position thereon. For this reason, we cannot at this point recommend to the HPSCI amendatory language to H.R. 12171 that Chairman Boland could provide Chairman Brooks. We will provide you a separate memorandum recommending a course of action in this regard following our meeting today with representatives of Justice, Defense and the FBI.

X1 3. ☐ Staff Position: We are working closely with the Offices of the Comptroller, General Counsel, Finance, and the Inspector General on this matter. These offices agree with the recommendation contained in paragraph 4 below.

X1 4. ☐ Recommendation: It is recommended that, during your luncheon meeting today with Comptroller General Staats, you sound him out on the following matters:

--His view of H.R. 12171 (i.e., what is behind the pressure in favor of the legislation).

--The extent to which the Comptroller General is interested in conducting audits of the CIA and, to the extent not now conducted, of other entities of the Community.

--Whether the Comptroller General would support tackling this whole question in the context of the charter legislation rather than as a separate bill.

SIGNED

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Attachments

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OLC RLB:sm (21 Aug 78)



Washington, D.C. 20505

Tab A
19 JUL 1978

Honorable Jack Brooks, Chairman
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I would like to take this opportunity to comment on H.R. 12171, the "Federal Accounting and Auditing Act of 1978."

H.R. 12171 would allow the General Accounting Office unlimited access to all information required to verify confidential funds expenditures, including those currently made by Director of Central Intelligence certification pursuant to authority in subsection 8(b) of the Central Intelligence Agency Act of 1949, as amended (50 U.S.C. 403j(b)). If enacted, this would have the operative effect of eliminating confidential funds as a resource available to the Director. Authority to account for expenditure of funds solely on the certificate of an officer of the Government is meaningless if such officer is subsequently required to produce to an external authority complete documentation supporting the expenditure. This authority is particularly crucial where the conduct of sensitive intelligence activities is concerned, and we strongly oppose legislation to override it.

The capability to carry out certain operations in the interests of the United States Government in secret fashion is a capability that has been continued through the nation's history. President Washington, for example, asked for, and was granted, a secret "contingent fund" expenditures authority, for which he could account "by making a certificate of the amount of such expenditure, as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sums therein expressed to have been expended." (Stat. at Large. I. 299) This fund was used by President Washington and successive Presidents in conducting foreign intelligence efforts, and it was well understood that the existence of the fund was grounded on the need for extreme secrecy in certain matters. This rather special capability comes down to us in present times of more complex government in the form of statutory authority for the President's Director of Central Intelligence to exercise control over the expenditures of confidential funds. This is the Director's "8(b) Authority," cited above, the actual terms of which closely parallel the authority given President Washington.

The capability for the Government to fund certain sensitive undertakings in a manner consistent with the requirements for strictest secrecy has never been lost or abandoned throughout our history. H.R. 12171, however, would have such an adverse effect since, if enacted, the bill would supersede section 8(b) of the Central Intelligence Agency Act; no exception is provided for national security interests in general or CIA expenditures in particular. This is unacceptable. It is a basic requirement for the successful conduct of sensitive activities of the Agency that the Director's "8(b) Authority" be preserved. In the future as in the past, it will be necessary to undertake actions of extreme sensitivity for which the withholding of information from all except those directly involved with the activities or in the oversight process is essential to the success of the action.

This bill, in providing for comprehensive, unrestricted and otherwise unlimited access by GAO to Agency activities--through access to Agency "books, documents, papers, records, and other information" and through related external verifications relating to confidential expenditures--to achieve the general and specific purposes of an audit, would not only supersede the Director's "8(b) Authority," but would also directly contravene the Director's statutory authority to protect sensitive intelligence sources and methods from unauthorized disclosure (section 403(d)(3), National Security Act of 1947, as amended; 50 U.S.C. 102(d)(3)). In effect, the bill would make it impossible for the Director to fulfill this responsibility since it would require him to surrender to the Comptroller General without restriction or selectivity all records relating to any particular expenditure. The bill does not reflect the considerations on which the Director's statutory responsibilities and authorities are based; intelligence activities must of necessity be carried out in a confidential manner, and the funding of these inherently sensitive activities is as much a part of that process as are the particulars of the activities themselves. In recognition of these factors, the Congress has provided that funding of sensitive intelligence activities shall not be subject to funding and accounting requirements applicable to other, less sensitive Government activities.

Furthermore, the requirements envisaged by H.R. 12171 are unacceptable in that they would certainly create conflicts which, according to the provisions of the bill, could be taken to open court for resolution. Because the bill would grant the Comptroller General the right to bring an action in the district court to compel the furnishing of any records not supplied to him, the bill has the potential of making the Comptroller General a "special prosecutor" in times of conflict between the Legislative and Executive Branches on intelligence matters. Taking such issues into open court could only further complicate matters, and more importantly, increase the potential for disclosure of intelligence sources and methods, since the Agency, as defendant in such suits, could be forced to discuss in open court activities financed through the use of confidential funds on Director certification.

As a corollary to the problem of the unauthorized disclosure of intelligence sources and methods, it must be underscored that the fact that Congress had passed legislation which would provide for GAO auditing of Agency confidential funds expenditures could have an adverse impact on present and potential intelligence sources. An essential factor in recruiting sources in support of operational activities is the assurance that such relationships will remain completely confidential. Should it become publicized that GAO is reviewing the most sensitive Agency activities, there may well be a tendency for sources of information or support to be unwilling to continue to provide information or support at the risk of their association becoming public knowledge; the degree of concern in this respect could have an even greater impact on future recruitments.

H.R. 12171 is also problematic from the point of view that any "uncleared" GAO employee could have access to the findings of confidential funds audits as well as related materials. The bill is unacceptably silent with regard to the matter of proper security and control arrangements to be provided such information. Even if the major provisions in this bill were unacceptable, at a minimum, all GAO personnel to be involved directly or indirectly in such audits would have to be subject to security arrangements identical with those that pertain to Agency personnel (for example, full security clearance(s), and execution of secrecy agreements).

Presently, four active congressional oversight committees (Senate and House Appropriations Committees, Senate Select Committee on Intelligence, and House Permanent Select Committee on Intelligence), with sizeable staff personnel, and the Surveys and Investigation Staff of the House Appropriations Committee, could claim jurisdiction over matters related to audits of CIA confidential funds. In our view, additional independent external audit appraisal authority is not needed, particularly at the cost of a probable substantial additional commitment of CIA manpower to deal with GAO teams and the increased number of individuals and entities having access to sensitive intelligence sources and methods.

It is submitted that treatment of the substance of H.R. 12171 at this time is premature since the same topic is being more appropriately considered in the context of H.R. 11245 (S. 2525), the intelligence charter legislation. Since the confidential funds authority is so fundamental to the successful completion of CIA's mission, consideration of all the issues involved is better left on the agenda of the intelligence charter legislation which, among other things, will address the matter of CIA statutory authorities as a whole.

For these reasons, we oppose enactment of H.R. 12171.

The Office of Management and Budget has advised there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

[Redacted Signature]

Frank Carlucci

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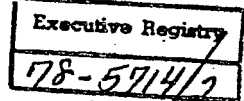
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OLD RECORD COPY

26 JUL 1978



Honorable Edward P. Boland, Chairman
Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to raise serious concerns that I have with H.R. 12171, the "Federal Accounting and Auditing Act of 1978," which was ordered reported on 19 July by the Committee on Government Operations.

H.R. 12171 would, among other things, allow the General Accounting Office unlimited access to all information required to verify confidential funds expenditures, including those currently made by Director of Central Intelligence certification pursuant to authority in subsection 8(b) of the Central Intelligence Agency Act of 1949, as amended (50 U.S.C. 403j(b)). Not only would this legislation supersede this "8(b) Authority," but it would also directly contravene the Director's statutory authority to protect sensitive intelligence sources and methods from unauthorized disclosure (section 403(d)(3) of the National Security Act of 1947, as amended; 50 U.S.C. 102(d)(3)). It is essential that the "8(b) Authority" be preserved. In the future as in the past, it will be necessary to undertake actions of extreme sensitivity for which the withholding of information from all except those directly involved with the activities or in the oversight process is essential to the success of the action.

The bill was introduced on 18 April 1978 by Chairman Brooks of the Committee on Government Operations. The bill was initially referred to the Government Operations Subcommittee on Legislation and National Security which, after one day of testimony by the Department of Justice on 26 June, referred the bill to the full Committee without mark-up. Deputy Assistant Attorney General Lawrence Hammond presented testimony, coordinated and concurred in by CIA, which stressed that unrestricted access by GAO to confidential funds expenditures is problematic from a constitutional viewpoint since it threatens the balance between the Executive and the Legislative Branches, and infringes upon the President's privilege of confidentiality in the diplomatic, military and national security spheres. In addition, OMB and CIA each forwarded reports in opposition to the bill to Chairman Brooks.

H.R. 12171 directly addresses an essential authority of the Director of Central Intelligence; if enacted, it would have a major adverse impact on the capability of this Agency to fulfill its vital mission. Based on your Committee's jurisdiction over such legislative matters under H. Res. 658, I would urge that you request the bill be sequentially referred to your Committee for immediate consideration of the intelligence equities at stake. We are prepared to present our case in full before the Permanent Select Committee on Intelligence.

I have enclosed a copy of this Agency's views letter which was sent to Chairman Brooks. Thank you for your attention to this very important matter; I look forward to further discussions on it.

Sincerely,

SIGNED

STANSFIELD TURNER

Enclosure

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OLC:RJW:sm (20 Jul 78)

April 28, 1973

OLC #78-0049/3

MEMORANDUM FOR: General Counsel
Legislative Counsel
Deputy Director for Resource Management

FROM : Deputy Director of Central Intelligence

SUBJECT : GAO Audits

1. I met on April 28th with Elmer Staats to discuss GAO audits of the Intelligence Community. After discussion

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3. I proposed that all requests for compartmented information be routed through our two Select Committees. Elmer categorically rejected this and maintained that the Committees would, themselves, agree with him. I said this was open to question.

4. Elmer's alternative was that we review the GAO requests on a case-by-case basis. I said this put the Director and me in the unenviable position of having to say no on a selective basis, and this could lead to fundamental misunderstanding with the GAO. Elmer said he comprehended our concern, but saw no other way. He felt he could not back off his responsibility, particularly since he had had access to compartmented information for a number of years.

5. Elmer did say, however, that he would agree to certain restrictions on his auditors. For example, he could agree that all reviews of compartmented information documents would be done in place, and no copies made. He could also agree not to circulate written reports to third agencies. Finally, he could agree that each GAO audit in the intelligence area would be reviewed personally by him or his Deputy.

6. We decided to go back to our respective staffs and reexamine the issue. It seems to me that there is merit to examining Elmer's proposals. A case-by-case review is, in fact, our present policy as I understand it. The restrictions Elmer is willing to impose would at least cut down on the number of requests. A flat "No" on all compartmented clearances would represent a policy change, and would lead to a confrontation.

7. Please give me your reactions.



✓ Frank C. Carlucci

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cc: DCI